amicus curiae, and urged that the lands in question become subject to settlement and improvement as contemplated by the provisions of the grant, in order that they might not be withdrawn from taxation, thus depriving the state of revenue from this source. This is the voicing of a protest quite prevalent in the West and founded on considerable reason, that the withdrawal and permanent reservation of vast areas of public domain by the federal government, places the states embracing such areas on a distinct plane of inequality with states which exercise complete sovereignty and power of taxation over all the lands within their borders.[3] Many of the parties to the action were settlers on lands already sold. The rights of such parties were left to be determined in other suits which the government might elect to initiate.

V. M. A.

VENDOR AND PURCHASER: DESTRUCTION OF BUILDING: RISK OF LOSS.—In a contract for the sale of improved realty, upon whom should the loss fall when the improvements are destroyed before the day set for the completion of the contract? In the case of *Higbie and Higbie v. Shields,*[1] a mill was burned between the date of the contract of sale and the day of conveyance. The court held that the loss fell on the vendor, and in so deciding laid particular stress on the fact that the vendor was in possession.

The courts of this country are divided, although not evenly, in determining this question, some holding that the loss falls on the vendee;[2] others, though usually courts of law, that the loss falls on the vendor;[3] and still a third group that the loss falls on the party in possession.[4]

"Since the decision of Paine v. Meller[5] it has not been doubted in England that the buyer is not excused from fulfilling his promise

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[3] See Deseret Water etc. Co. v. State of California (1914), 147 Cal. 147, 138 Pac. 981; The New Public Land Policy, 3 California Law Review, 289-291.

[1] (June 3, 1915), 20 Cal. App. Dec. 902, 150 Pac. 801. (Rehearing denied by Supreme Court, Aug. 2, 1915.)

[2] Martin v. Carver's Adm'r (1886), 8 Ky. 56, 1 S. W. 199; Sewell v. Underhill (1908), 127 App. Div. 92, 111 N. Y. Supp. 85; Dunn v. Yakish (1900), 10 Okla. 388, 61 Pac. 926; Manning v. North British & Mercantile Ins. Co. (1907), 123 Mo. App. 456, 99 S. W. 1095; Woodward v. McCollum (1907), 16 N. Dak. 42, 111 N. W. 623.

[3] Gould v. Murch (1879), 70 Me. 288, 35 Am. Rep. 325; Wells v. Calman (1871), 107 Mass. 514, 9 Am. Rep. 65; Powell v. Dayton etc. Ry. Co. (1885), 12 Ore. 488, 8 Pac. 544.

[4] Conlin v. Osborne (1911), 161 Cal. 659, 120 Pac. 755; Smith v. Phoenix Ins. Co. (1891), 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738; Sharman v. Continental Ins. Co. (1914), 167 Cal. 117, 138 Pac. 708, 1 California Law Review, 387.

[5] (1801), 6 Ves. Jr. 349, 31 Eng. Rep. R. 1088.

to purchase by accidental injury to the property" [6] which is the subject matter of an executory contract of sale. This doctrine, which is founded on the rule of equity that as soon as the contract is finally concluded, although it is wholly executory in form, there results by its operation an equitable conversion of the land and purchase money whereby the purchaser becomes the equitable owner, is without doubt sustained by the weight of authority.[7] The contrary view, taken by courts of law in determining the legal rights of the parties, namely that the loss falls on the vendor,[8] rests upon the theory of failure of consideration in the contract and might be termed the contract theory in contradistinction to the equitable principle of conversion.

The California courts, in an attempt to mitigate the severity of these conflicting rules, have favored a third one, ably championed by Professor Samuel Williston,[9] which is a compromise between the equitable and contract views—namely, that possession is the determining factor in deciding who should bear the loss. The courts of California have held without variation that the vendor in possession must bear the loss, in case of accidental destruction. Moreover, in cases where this point has been decided, strong dicta are found to the effect that the loss would fall on the vendee if he, instead of the vendor, were in possession.[10] No case in that state, however, decides that the loss does fall in this way although the general leaning of the courts seems to be in that direction, and considering the forcible dicta referred to, it is fair to presume that they will decide the question that way if it is ever presented to them.

Have not practitioners perhaps sometimes overlooked that section of the Civil Code of California [11] which, in substance, provides that a party to a contract may rescind the same if the consideration fails in a material respect from any cause? It would seem plain that the vendee might rescind for such a material failure as the destruction of a building by accidental fire. Even the vendee in possession might, it would seem, in a proper case rescind the contract.

M. P. G.

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[6] 9 Harvard Law Review, 106.

[7] See cases cited in note 2.

[8] See cases cited in note 3.

[9] See note 6.

[10] See cases cited in note 4. If risk of loss turns on the question of possession in executory contracts for sale of improved realty, to be consistent the courts should apply the same test in conditional sales of personalty, for all the reasons for holding the loss should fall on the party in possession in the former case apply in the latter case with equal force. This, however, the California courts have not done. See Waltz v. Silveria (1914), 25 Cal. App. 717, 145 Pac. 169; 3 California Law Review, 166.

[11] Cal. Civ. Code, § 1689, subd. 4.